Murphy J. 27

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IN THE

Supreme Court of the United States

JANUARY TERM, 1944.

No. 546

IN THE MATTER

OF

The application of MARY V. MURRAY, PHEBE KEIL, CLARENCE HANLON, WILLIAM and HELENA YURICH, GIOVANNI AUGELLO, MARY MAZOUREK, MAX EDELSTEIN, MAY C. SPRINGER, MOLLY BELLER, HARRY KOPELMAN, FRANCES PIRROTTI, ISRAEL BECK, DORA SIMBLOW, CATHERINE M. FRANZ, HERMAN WITTHAUS, LOUISE LITTLE, DIMITRIUS KAVAFIS, ROSE VETTEL, KATHERINE BELLION, MAX LEVINE, ANNA FROELICH, ADOLPH WEISLER, KOSTAS KUSULAS, MARPOL REALTY CORPORATION and 110 EAST 7TH STREET CORPORATION,

Petitioners,

AGAINST

FIORELLO H. LA GUARDIA, as Mayor of the City of New York, JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, NEWBOLD MORRIS, as President of the Council, EDGAR J. NATHAN, JR., as President of the Borough of Manhattan, JOHN CASHMORE, as President of the Borough of Brooklyn, JAMES J. LYONS, as President of the Borough of The Bronx, JAMES A. BURKE, as President of the Borough of Queens, JOSEPH A. PALMA, as President of the Borough of Richmond, constituting the Board of Estimate of the City of New York, the CITY OF NEW YORK, STUYVESANT TOWN CORPORATION and METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of New York.

MARTIN N. WHYMAN,
Of Counsel.

MENAHEM STIM,
Attorney for Petitioners.

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Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of New York.

To the Honorable the Chief Justice of the Supreme Court of the United States of America and the Honorable Associate Justices Thereof:

Your petitioners MARY V. MURRAY, PHEBE KEIL, CLARENCE HANLON, WILLIAM and HELENA YURICH, GIOVANNI AUGELLO, MARY MAZOUREK, MAX EDELSTEIN, MAY C. SPRINGER, MOLLY BELLER, HARRY KOPELMAN, FRANCES PIROTTI, ISRAEL BECK, DORA SIMBLOW, CATHERINE M. FRANZ, HERMAN WITTHAUS, LOUISE LITTLE, DIMITRIUS KAVAFIS, ROSE VETTEL, KATHERINE BELLION, MAX LEVINE, ANNA FROELICH, ADOLPH WEISLER, KOSTAS KUSULAS, MARPOL REALTY CORPORATION and 110 EAST 7TH STREET CORPORATION respectfully submit this petition for a writ of certiorari directed to the Supreme Court of the State of New York, New York County, to review the decision and order of the New York Court of Appeals in the above cause affirming the order of the Appellate Division of the Supreme Court of the State of New York, First Department, which in turn had affirmed an order of the Supreme Court of the State of New York, New York County, denying petitioners' application for a preliminary injunction and granting respondents' cross motion to dismiss the petition for injunctive relief on the merits.

The final order was entered in the office of the County Clerk of New York County on December 9, 1943 upon the remittitur of the Court of Appeals filed on December 3, 1943 making the order of the Court of Appeals the order of the Supreme Court.

Opinions Below.

A written opinion was rendered by the Supreme Court, New York County (R. 183-6). The Appellate Division of the Supreme Court of the State of New York affirmed the order of the Supreme Court, New York County, without opinion, but two Justices joined in a dissenting opinion

R. 194-7). The Court of Appeals affirmed, 4 to 2, the order of the Appellate Division. A written opinion was rendered by the New York Court of Appeals, both by the majority of the Court and the dissenting Chief Judge (R. 207-219).*

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 344).

Questions Presented.

In a four to two decision the New York Court of Appeals upheld the constitutionality of the Redevelopment Companies Law (N. Y. L. 1942, ch. 845 as amended by N. Y. L. 1943, ch. 234) and accordingly affirmed a dismissal of the petition for an injunction by which petitioners sought to restrain the furtherance of a redevelopment project commenced pursuant to the provisions of the aforesaid Redevelopment Companies Law. The principal questions are:

1. Is the power of eminent domain being exercised for a "public use" when private property is taken by a city, under the guise of exercise of such power, and then conveyed to a private corporation, admittedly created for private gain and not subject to regulation by law as to rents, profits, dividends and disposition of its property or franchises.

2. May the power of eminent domain be granted to a city for the purpose of taking private property to be transferred to and thereafter held by a private corporation which is not regulated by law as to rents, profits, dividends and disposition of its property and franchises.

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*These opinions have not yet been officially reported.

Statement.

The petitioners are owners of real property situated in the City of New York and located within the area affected by the operation of the Redevelopment Companies Law enacted by the New York Legislature in 1942 (N. Y. L. 1942, ch. 845) and amended in 1943 (N. Y. L. 1943, ch. 234).

The Redevelopment Companies Law was enacted by the New York Legislature at the request of Mayor La-Guardia and Park Commissioner Moses in an effort to interest insurance companies and savings banks to invest their surplus funds in the building of housing projects and the rehabilitation of slum areas in New York City (R. 161). The companies which the Mayor and the Commissioner hoped to attract by this legislation in 1942 failed to evince the desired interest (R. 161). When Commissioner Moses approached the Chairman of the Board of Directors of the respondent, Metropolitan Life Insurance Company, Commissioner Moses was advised that Metropolitan Life Insurance Company would consider the type of project contemplated by the statute only if the statute was first amended in certain specific respects R. 161-2). The proposed amendments were then prepared by Metropolitan Life Insurance Company (R. 162) and were submitted to the New York Legislature and the bill known as the Mitchell-Hampton Bill was voted by the New York Legislature in the closing days of the session without any public hearing (R. 33, 162). Prior to signing the bill, Governor Dewey expressed doubts concerning some of the provisions of the bill (R. 36) but he signed it and the bill became law on March 30, 1943.

The Redevelopment Companies Law is an enabling act and has its genesis in Article XVIII of the New York State Constitution which authorizes legislative action to provide for low rent housing for persons of low income and the clearance, replanning, reconstruction, rehabilitation of sub-standard and unsanitary areas (R. 45).

This Article in the New York State Constitution empowers the Legislature to "grant the power of eminent domain to any city" (Sec. 2) and also "to any corporation regulated by law as to rents, profits, dividends and disposition of its property or franchises" (Sec. 2). The Legislature is empowered to carry out the purposes of the article "in such manner, by such means and upon such terms and conditions as it may prescribe" (Sec. 1) and further "the Legislature is empowered to make all laws which it shall deem necessary and proper for carrying into execution" the powers conferred in the article (Sec. 10).

In essence the theory of the Redevelopment Companies Law, as originally enacted in 1942 and as amended in 1943, was to provide for the incorporation of "redevelopment companies" to clear and rehabilitate sub-standard and unsanitary areas. The language of the two versions of the statute is almost identical with the exception of those significant instances which gave rise to the proceedings in the courts below and present the precise Constitutional questions involved herein.

Section 23, N. Y. L. 1942, ch. 845 provided:

> "Sec. 23. *Transfer of title or foreclosure of project.* A redevelopment company shall not have power to sell any project without the consent of the local legislative body. * * * "

Section 24, N. Y. L. 1942, ch. 845 provided:

> "Sec. 24.' *Dissolution.* Except upon the expiration of the period of the corporate existence as fixed by its certificate of incorporation or a certificate amending the same, a redevelopment company shall not voluntarily dissolve without the consent of the local legislative body. * * * "

Section 23, N. Y. L. 1943, ch. 234 now provides:

> "Sec. 23. *Transfer of title or foreclosure of project.* Until the termination of the tax exemption, whether by expiration or by any other cause, a redevelopment company shall not have power to sell any project without the consent of the local legislative body. * * * "

Section 24, N. Y. L. 1943, ch. 234 now provides:

> "Sec. 24. *Dissolution.* After termination of any tax exemption granted pursuant to section twenty-six of this act, whether by expiration or by any other cause, or in the event that prior thereto the redevelopment company elects to pay to the municipality the total of all accrued taxes for which such exemption was granted and received, together with interest at the rate of five per centum per annum, the redevelopment company may voluntarily dissolve, and title to the project may be conveyed in fee to the owner or owners of its capital stock or to any corporation designated by it or them for the purpose, or the redevelopment company may be dissolved and reconstituted pursuant to appropriate laws relating to the formation and conduct of corporations, * * *. After such dissolution and conveyance or such reconstitution, the provisions of this act shall become and be inapplicable to any such project and its owner or owners, and any tax exemption granted to such redevelopment company pursuant to section twenty-six of this act shall cease and terminate."

Sections 23 and 24 of ch. 234, N. Y. L. 1943 eliminate supervision by local legislative bodies over the transfer of title to properties acquired by redevelopment companies or the dissolution of such companies and provide that by

merely waiving tax exemption and repaying accrued taxes for which exemption was granted, plus 5% interest, a redevelopment company may at any time "voluntarily dissolve" or be "reconstituted" and convey title to the project in fee to a private corporation or individual or even to itself as "reconstituted" and that after such dissolution or conveyance the provisions of the act are to be inapplicable to the new owners of the project.

A comparison of the sections 23 and 24 of the 1942 statute with the amendatory provisions of the 1943 statute shows that the amendments have the effect of increasing the rights, benefits and powers accruing to a redevelopment company and at the same time eliminate the specific safeguards and controls imposed by Article XVIII of the New York State Constitution.

Stuyvesant Town Corporation (hereinafter sometimes called "Stuyvesant") was organized as a redevelopment corporation by and as a wholly owned subsidiary of Metropolitan Life Insurance Company for the purpose of carrying out the provisions of the Redevelopment Companies Law, as amended in 1943 (R. 14, 42). A plan of rehabilitation to be undertaken by Stuyvesant was prepared and on May 5, 1943 the City Planning Commission, whose approval of the plan was necessary under the statute, held its first meeting. A second meeting was held on May 19, 1943 and in spite of vociferous objection on the part of owners and tenants in the locality affected, the Commission by a 5 to 1 vote approved the plan (R. 34-5, 73-158).

On June 3, 1943, a meeting of the Board of Estimate was scheduled for the purpose of voting on the plan approved by the City Planning Commission and in anticipation of this meeting the proposed contract between the City of New York and Stuyvesant was prepared (R. 16, 159-160) so that authorization could be given to proceed in accordance with the terms and provisions thereof.

The contract proposed to be entered into between the City of New York and Stuyvesant provides in Article II

thereof for the making of surveys or maps by Stuyvesant of the property necessary to be acquired and the commencement by the City of New York "at the request of" Stuyvesant of condemnation proceedings of all property in the area and the payment by Stuyvesant to the City of New York of all sums expended or required to be expended by the City of New York in connection with the acquisition of the property so to be condemned (R. 53).

Although Article XVIII of the New York State Constitution empowered the Legislature to grant the power of eminent domain either to a municipality or to a private corporation regulated by law as to rents, profits, dividends and disposition of its property or franchises (Sec. 2), the Redevelopment Companies Law, as amended in 1943, granted the power of eminent domain only to the municipality but the same section also provides (Sec. 20):

> "When title to the real property shall have vested in the municipality it shall convey the same to the redevelopment company * * *."

Proceedings under Article 78 of the New York Civil Practice Act were instituted in the Supreme Court, New York County, by order to show cause dated, May 28, 1943 to restrain the furtherance of the project and the plan to be submitted to the Board of Estimate at its meeting of June 3, 1943 (R. 9-11). In accordance with the decision of Schreiber, *J.*, of the Supreme Court of the State of New York, New York County, an order was entered in the County Clerk's office of New York County on June 4, 1943, denying the application for injunctive relief and granting a cross motion made by respondents to dismiss the petition on the merits (R. 6-8). By order dated July 2, 1943, the Appellate Division of the Supreme Court affirmed, 3 to 2, without opinion, the order of the Supreme Court. The two dissenting Justices joined in a dissenting opinion (R. 193-7). By order entered December 2, 1943, the New York Court of Appeals, affirmed, 4 to 2, the order of the

Appellate Division, the dissenting opinion being written by the Chief Judge (R. 218-219).

Specification of Errors.

The court below erred,

1. in holding that the condemnation of private property under the authority of the Redevelopment Companies Law, as amended in 1943, was for a public use;

2. in failing to hold that the condemnation of private property under the authority of the Redevelopment Companies Law, as amended in 1943, violated the due process clause of the Fourteenth Amendment;

3. in upholding the exercise of the power of eminent domain under the authority of the Redevelopment Companies Law, as amended in 1943, in violation of the due process clause of the Fourteenth Amendment, so as to permit Stuyvesant Town Corporation to acquire private property by condemnation when such corporation was not "regulated by law as to rents, profits, dividends and disposition of its property and franchises", as prescribed in Article XVIII of the New York State Constitution;

4. in holding, in violation of the due process clause of the Fourteenth Amendment, that there was no requirement that Stuyvesant Town Corporation be subjected to regulation as to rents, profits, dividends and disposition of property or franchises acquired by it.

Reasons Relied on for the Allowance of the Writ.

1. The majority of the New York Court of Appeals has erroneously misconceived the use to which the prop-

erty was to be put which was the subject of the condemnation proceedings authorized by the Redevelopment Companies Law. The Court below stated that it found no basis for the constitutional objection urged by petitioners that the condemnation of private property authorized by the statute is not for a public use (R. 214).

There is no specific prohibition in the Federal Constitution which acts upon the states in regard to their taking of private property for any but a public use. The Fifth Amendment which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the Federal government. *Spies* v. *Illinois,* 123 U. S. 131; *Thorington* v. *Montgomery,* 147 U. S. 490. In the Fourteenth Amendment the provision regarding the taking of private property is omitted and the prohibition against the state is confined to its depriving any person of life, liberty or property without due process of law.

It is established that a person is deprived of his property without due process of law, in violation of the Fourteenth Amendment, if such property be taken by or under state authority for any other than a public use, by the assumption of the right of eminent domain. *Head* v. *Amoskeag Mfg. Co.,* 113 U. S. 9; *Kaukauna Co.* v. *Green Bay etc. Canal,* 142 U. S. 254; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112; *Missouri Pacific Co.* v. *Nebraska,* 164 U. S. 403; *Chicago, Burlington & Quincy Ry. Co.* v. *Chicago,* 166 U. S. 226.

In that way the question whether private property has been taken for any other than a public use raises a Constitutional issue even where the taking is under the authority of the state instead of the Federal government. *Fallbrook Irrigation District* v. *Bradley* (*supra*).

The prohibition against the taking of private property for public use, except upon the payment of just compensation, clearly implies that it can not be taken for private

use at all. *United States* v. *Certain Lands in City of Louisville*, 9 Fed. Supp. 137, 138.

Lewis, in his work on *Eminent Domain* (*3rd Ed.*) says (Sec. 258):

> "Public use means the same as use by the public * * *. If the Constitution means that private property can be taken only for use by the public, it affords a definite guide to both the legislature and courts. Though the property is vested in private individuals or corporations, the public retain certain definite rights to its use or enjoyment and to that extent it remains under the control of the legislature. If no such rights are secured to the public, then the property is not taken for a public use and the act of appropriation is void."

In *United States* v. *Certain Lands in City of Louisville* (*supra*), where the utilization of the power of eminent domain in a program contemplating the use of the condemned property by a restricted group of private persons was held unconstitutional, the court further held that "public use" for the purpose of eminent domain means use by the government in the performance of governmental functions or a use available as of right to all or a part of the public. In rejecting the argument that "public use" was synonymous with "public benefit", "public advantage" or "general welfare", the court indicated that whether the public will have the use of the property taken under a particular statute is a question readily ascertainable from the statute itself, but whether a particular improvement will be of "public benefit", "public advantage" or for the "general welfare" of the public is merely a question of opinion, about which men may differ and which can not be referred to any definite criterion.

"The moment the mode of use is disregarded, and we permit ourselves to be governed by speculations upon

benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principles to guide us." *Bloodgood* v. *Mohawk & H. River Co.*, 18 Wend. (N. Y.) 9, 31.

Since this Court has indicated that in enforcing the Fourteenth Amendment, it would regard with respect the views of state courts upon what should be deemed public uses in any state inasmuch as the determination of such question is largely influenced by local conditions *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, the views of the New York Court of Appeals are significant. In *Matter of the Application of New York* v. *New York Central & Hudson River Railroad Co.*, 135 N. Y. 253, that court stated (p. 259):

> "Speaking in general terms I should say that the public must, under proper police regulations, have the right to resort to the land or property for the use for which it was acquired, independently of the mere will or caprice of any private person or corporation in whom the title to the property would vest upon condemnation. Otherwise the use could not be public * * *."

In *Matter of Petition of N. Y. L. & W. R.R. Co.*, 99 N. Y. 12, the New York Court of Appeals said (p. 24):

> "The test appears to be, not what it does or may choose to do, but what under the law it must do, and whether a public trust is impressed upon it. It does not so hold its property impressed with a trust for the public use unless its charter puts that character upon it and so that it can not be taken off. If the law of its existence does not prevent it from being a mere private corporation, from disregarding if it pleases all public uses; if it may abandon its

> business at any moment and refuse to run its propellers and sell its lands by an absolute title without responsibility to the sovereign, which is permitted by its charter (Sec. 2); in short if under that charter it may be a purely private corporation, its property is not so held as to be exempt from a taking under a law of eminent domain."

Applying the foregoing criteria for determining "public use" to the instant case, it is clear that the use to which the property sought to be condemned is to be put is not a "public use". Under the proposed contract with the redevelopment company all public streets in the area are to be closed and discontinued (R. 18, 55); it is proposed to have an average rental of not to exceed $14 per room as compared with the present average rental of $7 per room thereby resulting in wholesale eviction of present occupants of the area (R. 36-7); the public will not be admitted to this walled town in the heart of the City of New York except by sufferance of the redevelopment company (R. 37-8). Clearly the public will have no "right to resort to the land or property for the purpose for which it was acquired, independently of the mere will or caprice of any private person or corporation in whom title to the property would vest upon condemnation". *Matter of the Application of New York* v. *New York Central & Hudson River Railroad Co.* (*supra*). Furthermore, the redevelopment company could shake off the safeguards of control imposed upon it and alienate the property acquired by it as a result of condemnation to another corporation or even to itself, if "reconstituted". Such transfer could be accomplished by the mere waiver of tax exemption privileges and would free the property from all restriction or regulation of the statute authorizing the taking. Since the statute creating the redevelopment company not only does not prevent it from

turning itself into a mere private corporation at its election, but expressly sanctions a dissolution of the redevelopment company and allows a conveyance of the property acquired by eminent domain to another corporation or to itself "reconstituted", free of all restriction (L. 1943, Sec. 23. 24, ch. 234), it is impossible to regard the purpose of acquisition of the property involved as being for a "public use". *Matter of Petition of N. Y. L. & W. R.R. Co.* (*supra*).

The extent to which the exercise of the power latent in the redevelopment company may be carried is readily foreseen. After acquisition of valuable properties through the exercise of the power of eminent domain, real estate value may increase as a result of market conditions. It will then be to the decided advantage of the redevelopment company to renounce tax exemption benefits and thereby relieve itself of the statutory limitations placed upon it. It could then increase rents and so increase profits or sell the property at as large a profit as could be obtained—all without any limitation or regulation. This was clearly stated by Untermyer, *J.*, of the Appellate Division of the Supreme Court in his dissenting opinion when he declared (R. 195-6):

> "* * * such a corporation, after exercising the power of eminent domain, might at any time shake off all the safeguards which the Constitution requires as a condition of the exercise of that power by the simple expedient of relinquishing the benefit of tax exemption. I cannot believe that these salutary provisions of the Constitution are satisfied by restrictions from which the corporation may escape at will * * *.
>
> The time may come when rentals shall increase beyond the levels specified in the contract between the corporation and the City of New York * * * then

> it may be to the advantage of the corporation to renounce the tax exemption, relieve itself from the limitations imposed by statute and the contract, demand as much rent as it can earn and even alienate property acquired by condemnation almost as freely as if the restraints required by the Constitution had never been imposed."

The very suggestion of the extent to which the exercise of such power might be carried, compels its rejection. *United States* v. *Certain Lands in City of Louisville* (*supra*). This same court said in language equally appropriate to the instant case (pp. 141-142):

> "The language of the statute forces one to the conclusion that the proposed buildings are to be constructed for the use of those private individuals who may be selected by the agencies for their enjoyment. The right to purchase the buildings or to lease them is not a right made available by the statute to all of the public upon equal terms, free from the will of governmental agencies, or to any part of the public. The matter of whether the property will be sold or leased, and to whom sold or leased and upon what terms, is entirely within the discretion of the administrative branch of the government, with no rule laid down in the statute which that department is compelled to reject or follow. Therefore, the buildings proposed to be constructed are not to be devoted to a public use, in the sense that they are to be used to house legitimate governmental activities, nor are they to be devoted to a public use in the same sense that the statute makes them available as a matter of right and upon equal terms to all the public or any part thereof."

2. The majority of the New York Court of Appeals failed to recognize that the Redevelopment Companies Law as amended in 1943 endeavored to accomplish by indirection what it could not constitutionally do directly.

The Redevelopment Companies Law as amended in 1943 grants the power of eminent domain to a municipality in form but in substance this power is given to the private redevelopment company. According to the contract proposed to be entered into between the municipality and the redevelopment company, the private company is to indicate by maps or surveys prepared by it the exact property desired by it and the municipality following the instructions of the private company is to go through the motions of condemnation at the request of the private company and the private company is to pay the cost of acquisition and all expenses attendant thereon (R. 52-53).

Under the provisions of Article XVIII of the New York State Constitution it was constitutionally impossible for the power of eminent domain to be given to a private corporation unless such corporation was circumscribed by certain necessary restrictions to safeguard the public. On the other hand it was not necessary under the constitutional mandate for the grant of similar power to a municipality to be surrounded by any safeguards.

What was done in the instant case was to give the power of eminent domain in substance to the private redevelopment company, which concededly is not a corporation "regulated by law" in the manner prescribed by Article XVIII of the New York State Constitution under the disguise, thinly veiled, of giving the power in form to a municipality. This was clearly pointed out in the dissenting opinion of Chief Judge Lehman in the Court below when he stated:

> "Nor may the power of eminent domain be granted to a city or public corporation for the

> purpose of taking private property to be transferred to and held thereafter by a private corporation to which the power of eminent domain could not be granted directly."

Form is not the only thing essential to due process of law. *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, 695. Due process of law requires that the parties or officers proceeding to make the appropriation shall keep within the authority conferred and observe every regulation which the act makes for the protection or in the interest of the property owner. *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago,* 166 U. S. 226, 241; 2 Story Const. Sec. 1956.

In *Chicago etc. R. Co.* v. *Illinois,* 200 U. S. 561, dealing with a matter in which form was observed and the public purpose was ostensibly served, but where the substance clearly showed that the public purpose could be defeated by the means employed, this Court stated (p. 587):

> "If the means employed have no real substantial relation to the public objects, which government may legally accomplish; if they are arbitrary and unreasonable beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt."

It has been shown in the recitation of facts that Metropolitan Life Insurance Company refused to interest itself in the redevelopment-project when first approached by Commissioner Moses after the passage of the 1942 Law. It was only after the amendments to the 1942 Law, proposed and drawn by Metropolitan Life Insurance Company, had been adopted, that Metropolitan Life Insurance

Company consented to undertake the project. An analysis of the 1943 Law shows that the only significant change from the 1942 statute is the addition of provisions which permit the redevelopment company to dissolve at any time and convey its properties to another private company, not subject to any control, by merely giving up tax exemption benefits.

In a memorandum to the Board of Estimate, dated May 28, 1943, Commissioner Moses frankly concedes that the proposed project is a private insurance rehabilitation project and not a public project. He says (R. 170-171).

> "The claim is made that an insurance company project, such as Stuyvesant Town, is in fact a public project because the City closes streets, grants partial tax exemption and extends the power of eminent domain. * * * They are inducements to a responsible fiduciary to undertake an extremely hazardous enterprise of City slum clearance and to make an investment which conservative trustees would not ordinarily undertake. The trustees must look ahead over a period of many years. They can not be expected to turn over to all sorts of future public officials control over the daily management of housing facilities into which they have put a huge amount of the funds of millions of policyholders. Those who insist upon making projects of this kind a battleground for the vindication of social objectives, however desirable, and who persist in claiming that a private project is in fact a public project, obviously are looking for a political issue and not for results in the form of actual slum clearance."

The clear indication that the 1943 Law was promulgated at the specific request of Metropolitan Life Insur-

ance Company and that the amendments were in fact drafted by it and that the amended statute was intended to provide "inducements to a responsible fiduciary to undertake" the project are all matters which might properly be held to have a material bearing upon the question of whether the proposed use might not in fact be a public use. *Clark* v. *Nash,* 198 U. S. 361, 368.

It was never intended that the power of eminent domain should be exercised as an inducement to a responsible fiduciary to undertake a project unless the enterprise is charged with a public trust and retains the character of the public purpose which cannot be shaken off at will. To hold otherwise would permit by the subterfuge of an ostensible public purpose, the condemnation of private property for private use.

It is evident that Metropolitan Life Insurance Company was chiefly interested in the determination to be the sole judge of whether or not the project should retain the character of an ostensible public purpose or that of a private one. This only served to further the private interests of Metropolitan Life Insurance Company. The right given to the redevelopment company to shake off the safeguards imposed by law for the benefit of the public and to turn the project into a purely private enterprise, free of all restriction or regulation has "no real substantial relation to the public objects" and is clearly "beyond the necessities of the case". *Chicago etc. R. Co.* v. *Illinois* (*supra*).

To sanction the condemnation of private property under these circumstances would amount to taking private property of one person without his consent for the private use of another, and would be in violation of the due process clause of the Fourteenth Amendment.

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari directed to the Supreme Court of the State of New York, New York County, be granted to review the decision and order of the Court of Appeals of the State of New York.

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